

Ram Kumar Agarwalla and Brothers

Vs

Commissioner of Income-Tax, Central, Calcutta

Civil Appeal No. 176 of 1966

(J. C. Shah, V. Ramaswami-I, V. Bharagava JJ)

26.10.1966

JUDGMENT

SHAH J.

M/s. Ram Kumar Agarwalla & Brothers - hereinafter called 'the assesseees' - were carrying on business at Calcutta as 'share-brokers, share dealers and paper merchants'. Swadeshi Cotton Mills Ltd. - a public limited company - operates at Kanpur a large unit producing cotton textiles. It was originally managed by a firm of Managing Agents styled M/s. Horseman Brothers. Some time early in 1946 M/s. Horseman Brothers desired to dispose of their share-holding in the Company, and to part with the Managing Agency. David Mitchell, a partner of M/s. Lovelock & Lewis - Accountants of the Company - Rowan Hodge of M/s. Orr Dignam & Co. - solicitors of the Company - and the assesseees started joint negotiations with M/s. Horseman Brothers to purchase the controlling interest in the Company. About the month of April, 1946 M/s. Mangtaram Jaipuria acting through their partner Anandram Gajadhar were also negotiating to secure the controlling interest in the Company. M/s. Mangtaram Jaipuria addressed a letter on April 29, 1946, to David Mitchell to the following effect :

"With reference to your negotiations to acquire the controlling interest in the Swadeshi Cotton Mills Co. Ltd., we confirm that we and our associates are desirous of purchasing the same and in the event of your securing the same for us and upon your giving up all claims to purchase the same and assigning to us and our associates any interest that you may have acquired therein, we hereby agree to pay you and your colleagues a capital sum of Rs. 6,00,000/-. Such payment to be made upon completion of the purchase by us."

M/s. Mangtaram Jaipuria also obtained a letter of guarantee for Rs. 6,00,000/- from the Imperial Bank of India in favour of David Mitchell. M/s. Mangtaram Jaipuria purchased the shareholding of M/s. Horseman Brothers for Rs. 4,03,00,000/-. Thereafter the amount of Rs. 6,00,000/- was duly paid to David Mitchell, Rowan Hodge and the assesseees, and it was divided equally between them - each receiving Rs. 2 lakhs. The assesseees paid Rs. 25,000/- out of their share to one Ratan Lal Goel for "services rendered in the deal", and credited the balance of Rs. 1,75,000/- as "brokerage" in their profit & loss account, and submitted a return of income for the assessment year 1947-48 showing that receipt as income from "brokerage in the course of business." Later, the assesseees submitted a revised return excluding the amount of Rs. 1,75,000/-. The Income-tax Officer rejected the claim of the assesseees that the amount of Rs. 1,75,000/- was a non-recurring casual receipt exempt from tax under s. 4(3)(vii) of the Act or that it was a capital and not revenue receipt. The order was confirmed by the Appellate Assistant Commissioner. On the plea of the assesseees that the amount of

Rs. 2,00,000 received by them as consideration for agreeing to refrain from carrying on their business and was on that account not taxable as their income, and that in any event it was a non-recurring casual receipt, there was difference of opinion between the two Members who constituted the Appellate Tribunal, and the appeal was referred to a third Member who remanded the case for a finding on certain matters on which the order of the Appellate Assistant Commissioner was silent. The Appellate Assistant Commissioner then reported that the payment of Rs. 6,00,000/- was not made only as an inducement to the assesseees to refrain from competition in purchasing the controlling interest in the Company, but it was made to remunerate the services rendered by the assesseees and their associates in helping M/s. Mangtaram Jaipuria to acquire the controlling interest. The Tribunal agreed with the report of the Appellate Assistant Commissioner and dismissed the appeal. The Tribunal observed :

"He never had the intention or the money to buy the Mills worth a few cores. The very fact that he had two other associates will again show that there was no intention of either of these three persons to purchase the Mills. Partners of solicitors and auditors had no intention of buying the Mills. I think that the sum of Rs. 2 lacs has accrued to the assesseees as a result of a venture in the nature of trade. Services of auditors, brokers and solicitors have been employed in completing the sale."

The Tribunal submitted a statement of the case on the following two questions, on application by the assesseees, under section 66(1) of the Income-tax Act :

"(1) Whether there was any material on record before the President to give a finding to the effect that the contention of the assessee that it intended to buy the Mills was without any basis whatsoever ?

(2) Was the receipt in question a revenue receipt from a venture in the nature of trade and has it been rightly brought to tax ?"

The High Court of Calcutta held that there was ample material to support the finding of the Tribunal that the receipt in question was a revenue receipt from a venture in the nature of trade. With special leave, the assesseees have appealed to this Court.

Counsel for the assesseees says that the two Members of the Tribunal who originally heard the appeal had concurrently held that Rs. 6 lakhs were paid to the assesseees and their associates for dissuading them for not competing with M/s. Mangtaram Jaipuria and it was not open to the third Member to ignore that finding and to arrive at a different conclusion. We are unable to agree with that contention. On a difference of opinion, the appeal in its entirety and not any specific question, was referred to the third Member. Again only the Accountant Member was of the view that the receipt of Rs. 2 lakhs to the assesseees arose not in the course of their business, but because they agreed to refrain from competing with M/s. Mangtaram Jaipuria in that firm's attempt to acquire the controlling interest in the Company : the Judicial Member did not accept that view.

The terms of the letter addressed by M/s. Mangtaram Jaipuria to David Mitchell make it abundantly clear that Rs. 6 lakhs were agreed to be paid primarily as remuneration for services to be rendered. The expression "in the event of your securing the same (controlling interest in the Swadeshi Cotton Mills) for us, and upon your giving up all claims to purchase the same, and assigning to us and our associates any interest that you may have acquired, we hereby agree to pay you..... sum of Rs. 6,00,000/-" evidences that object. The Tribunal had also called for a report from the Appellate

Assistant Commissioner and that Officer, as we have already observed, expressly recorded that the payment made to the assesseees and their associates was for services rendered in acquiring the controlling interest for M/s. Mangtaram Jaipuria and not for dissuading them in competing for the purchase of the shares. The Tribunal accepted the report of the Appellate Assistant Commissioner, and observed that the assesseees had no intention to buy the controlling interest in the company. The principal business of the assesseees was in paper, and they were doing some business in shares and brokerage' in shares. The evidence does not disclose how it was intended by the assesseees to finance such a large transaction. The Tribunal was apparently of the view that a solicitor, an auditor and a firm of share-brokers and paper merchants should not have been associated in a genuine project of acquiring the controlling interest in one of the largest textile units in the country which was expected to and did cost Rs. 4 crores. The Tribunal had directed that certain persons including Ram Kumar Agarwalla the principal partner of the assesseees be examined as witnesses. The principal partner of the assesseees did not give evidence. Ramgopal Agarwalla another partner of the firm who appeared before the Appellate Assistant Commissioner pleaded that he had no personal knowledge about the details of the negotiations or "as to the financial part of the aspect of the matter, since it was being dealt with by the senior partner Ram Kumar Agarwalla". David Mitchell and Rowan Hodge had it appears left India, and they also could not be examined. The conclusion recorded by the Tribunal that the assesseees David Mitchell and Rowan Hodge had no intention to acquire the controlling interest, but were seeking to associate themselves in a venture in the nature of trade, cannot in the circumstances be said to be without evidence. The conclusion that the assesseees and their two associates received Rs. 6,00,000/- not in consideration of refraining from competing in the purchase of the controlling interest, but as remuneration for services rendered is based on evidence before the Tribunal. The receipt must therefore be regarded as a revenue receipt earned in the course of the business of the assesseees.

It is unnecessary to make a detailed reference to the decisions which were cited at the Bar e.g. Higgs v. Oliver [33 T.C. 136] and in Commissioner of Income-tax Bombay v. The Mill Store Co. Karachi [9 I.T.R. 642]. In Higgs's case [33 T.C. 136] a professional actor who had agreed to give his exclusive services to a film company in consideration of a fixed sum, and a proportion of the net profits from exploitation of a film was, after the agreement was fulfilled, given a sum of 15,000 as consideration for an undertaking not to act, produce or direct any film for any person for a period of eighteen months. It was held that the amount paid was not for carrying on business, but for refraining from carrying on the business and was not taxable. In the Mills Store Company's case [9 I.T.R. 642] under an agreement for a stated consideration the assessee Company parted with the oil tanks and installations and other structures and goodwill and leasehold rights held by it in respect of the land on which its business of storing petroleum and petroleum products was carried, and agreed not to import petroleum for ten years, and not to act on behalf of any one else as importers of petroleum for five years. By another agreement in consideration of extending the latter restriction to ten years, the assessee was paid Rs. 10,000/- annually during the subsistence of the restriction. It was held by the Chief Court of Sind that the sum of Rs. 10,000/- was not the direct result of the profits or gains accruing to the assessee as a result of the business actually carried on by them, and did not fall under the head "Profits and gains of business, profession or vocation'. These cases have, on the findings recorded by the Tribunal, no relevance.

Under s. 4(3)(vii) receipts which are of a casual and non-recurring nature are not liable to be included in the computation of the total income of the assessee; but the rule in express terms does not apply to capital gains, receipts arising from business or the exercise of a profession or vocation and receipts by way of addition to the remuneration of an employee. On the finding recorded by the Tribunal, the receipt arose from the business of the assesseees, and is not exempt under s. 4(3)(vii).

The appeal therefore fails and is dismissed with costs.

R.K.P.S.

Appeal dismissed.

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